

DECISION



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THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-201657

DATE: May 5, 1981

MATTER OF: GALE Corporation

DL606634

[Protest Alleging That Bid Specifications Were Unduly Restrictive]

DIGEST:

Where adequate specifications of an item are not available so as to permit formal advertising, GAO will take no exception to negotiated procurement based on designated part or model number of manufacturer since firms are afforded basis for submission of alternate offers pursuant to Products Offered clause.

The GALE Corporation (GALE) protests the allegedly restrictive nature of solicitation number DLA700-81-R-0656, issued by the Defense Logistics Agency's Defense Construction Supply Center (DCSC) for sound module rooms (sound proof rooms). The solicitation identified the item being procured by manufacturer's trade name, with size and electrical specifications, and allowed for a proposed alternate if it could be shown to be essentially identical to the cited part.

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GALE's prime argument is that bid specifications unduly restricted competition because they were overly narrow, thereby preventing GALE from submitting a proposal. We find no merit in this and the protester's other contentions.

The solicitation was issued on December 1, 1980, with a closing date of December 31, 1980, soliciting offers on three sound module rooms identified by Wenger Corporation part No. 0706. On page 27 of the solicitation was included provision L32, Products Offered, which outlined conditions under which alternate offers would be considered. This provision, paragraph b4, indicated necessary data to be supplied by offerors of alternate items. A note under this

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provision indicated that the Government did not have detailed specifications for the item being procured.

GALE contends the specifications were inadequate; that it sought additional information from the DCSC, but no further information was forwarded to it. GALE further contends that since the solicitation was negotiated, it should not have been advertised in the Commerce Business Daily and suggests the contracting process was "unconscionable for the errors" it contained. Finally, GALE argues that, as a major producer of noise control products for many years, it is unable to believe that "adequate specifications were not available or reasonably obtainable."

DCSC states the solicitation is based on a requisition for a non-National Stock Number (NSN) item received from the United States Military Command, Germany, and since adequate specifications were not furnished to permit formal advertising, negotiation was justified under 10 U.S.C. § 2304(a)(10) (1976) as implemented by Defense Acquisition Regulation (DAR) § 3-210.2(xiii) (DPC #76-12, October 28, 1977). DCSC asserts the proposed procurement was synopsisized in the Commerce Business Daily as required by DAR § 1-1003.1(a), which requires that proposed negotiated procurements which may result in awards in excess of \$10,000 shall be published in the Commerce Business Daily. DCSC points out that although GALE called it for further information relating to the solicitation and maintains DCSC did not respond to its request, the record indicates that a DCSC buyer spoke with GALE's industrial product manager and advised him that DCSC had no additional data pertaining to the sound module rooms other than the Wenger model number. DCSC also states that, by virtue of the Products Offered clause, provision L32, firms were afforded a basis for the submission of alternate offers for consideration.

A procuring activity has the responsibility for establishing its minimum needs, and this Office will not dispute the judgment that those needs can only be met by a particular manufacturer's part, or the basis for such judgment, unless clearly shown to be

unreasonable. See Metal Art, Inc., B-192901, February 9, 1979, 79-1 CPD 91; and Metal Art, Inc., B-194180, B-194181, July 11, 1979, 79-2 CPD 25. Further, the protester has the burden of affirmatively proving its case. C.L. Systems, Inc., B-197123, June 30, 1980, 80-1 CPD 448.

While GALE has disputed that adequate specifications were not available to the procuring activity for this non-NSN item to permit formal advertising, it has not provided any evidence to support its position. Therefore, we will accept the agency's position that such data is not available to it. Where adequate data is not available to an agency to enable it to conduct a competitive procurement, we will take no exception to an award based on a designated part. See the cases, Metal Art, Inc., supra, involving similar protests which were denied where sufficient data was not available for competitive procurement and the agency designated a part and included the Products Offered clause as here.

In the circumstances, it is our view that the solicitation was properly issued under the authority of 10 U.S.C. § 2304(a)(10). Moreover, as the agency points out, the procurement was properly synopsisized in accord with DAR § 1-1003.1.

Accordingly, the protest is denied.

Wenger advises that its model No. 0706 Sound Module Room is listed with total specification data in the industry's Sweets Catalog and if, as GALE maintains, it has "successfully bid and completed a multitude of U.S. Government jobs," GALE must be aware of this trade publication and could have turned to it for the specifications.

As indicated in the Metal Art cases, in view of Wenger's advice, we think it is incumbent upon DCSC to obtain the necessary data, whether from Wenger or Sweets Catalog, so that any further procurements may be made on a competitive basis.

Milton J. Aorolan

Acting Comptroller General
of the United States